COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, AUGUST 22, 2001

COMMONWEALTH OF VIRGINIA, ex rel.

ROBERT E. LEE JONES, JR.

v. CASE NO. PUC990157

MCI WORLDCOM NETWORK SERVICES OF VIRGINIA, INC, and MCI WORLDCOM COMMUNICATIONS OF VIRGINIA, INC.

FINAL ORDER

On September 17, 1999, Robert E. Lee Jones, Jr. ("Mr. Jones" or "Complainant") filed with the State Corporation Commission ("Commission") a petition seeking relief against MCI Telecommunications Corporation ("MCI") and the Virginia Department of Corrections ("DOC") concerning the rates charged to consumers for collect toll calls placed by inmates on pre-subscribed institutional telephones at DOC facilities (the "Inmate Telephone System" or "ITS"). Mr. Jones is an inmate at a DOC facility.

By Preliminary Order of February 4, 2000, the Commission docketed this matter and consolidated it with a second, similar complaint against MCI, treating the two filings as formal complaints against MCI WORLDCOM Network Services of Virginia,

Inc.,[1] pursuant to Rule 5:6 of the Commission's Rules of Practice and Procedure ("Procedural Rules").[2] We directed MCI WORLDCOM and invited DOC to respond to the complaints and permitted the complainants to file a reply.[3]

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[1] Upon the merger of the MCI and WORLDCOM parent companies, MCI Telecommunications Corporation of Virginia, which has on file with the Commission a "Maximum Security Collect" tariff for collect calls from prisons, became MCI WORLDCOM Network Services of Virginia, Inc. The company's certificate to provide interexchange telecommunications services in Virginia was reissued in its new name on January 20, 2000, in Case No. PUC990220. Accordingly, in our Preliminary Order the Commission deemed these complaints as filed against MCI WORLDCOM Network Services of Virginia, Inc., and we instituted this proceeding against that company.

Another MCI WORLDCOM company, MCI WORLDCOM Communications of Virginia, Inc., obtained an interexchange certificate on July 12, 2000, in Case PUC000120. This company made a tariff filing on September 1, 2000. The tariff filing states, among other things, that although MCI Telecommunications Corporation of Virginia became MCI WORLDCOM Network Services of Virginia, Inc., upon the MCI WORLDCOM merger, the retail services of the former MCI Telecommunications Corporation of Virginia "such as the VDOC contract" were "transferred" to MCI WORLDCOM Communications of Virginia, Inc.

There had been no claim in the initial pleadings filed in this matter by MCI Telecommunications Corporation of Virginia, Inc.'s successor, MCI WORLDCOM Network Services of Virginia, Inc., that it was not the proper corporate entity before the Commission. Nevertheless, we substituted MCI WORLDCOM Communications of Virginia, Inc., for MCI WORLDCOM Network Services of Virginia, Inc., inasmuch as it is that corporate entity providing the service that is the subject of the complaints raised.

As used in this Order, "MCI WORLDCOM" or "the Company" will describe both MCI WORLDCOM Communications of Virginia, Inc., and, in reference to previous filings in these proceedings, MCI WORLDCOM Network Services of Virginia, Inc.

[2] 5 VAC 5-10-310. The Procedural Rules were amended and recodified at 5 VAC 5-20-10 et seq. effective June 1, 2001.

[3] The second, similar complaint against MCI was filed on December 21, 1999, by Jeffrey D. Barnes, another inmate at a DOC facility. Barnes's complaint was docketed as Case No. PUC990246. The Commission dismissed this complaint by Order entered on May 7, 2001, after Mr. Barnes failed to prosecute his claim.

By our Order on Motions of April 25, 2000, we denied motions to dismiss filed by DOC and MCI WORLDCOM on March 29, 2000, and March 30, 2000, respectively. We permitted them to file supplemental responsive pleadings and afforded the complainants the opportunity to reply.

Citizens United for Rehabilitation of Errants–Virginia ("Virginia CURE") also filed a petition requesting an examination of the rates charged by MCI WORLDCOM to the families of callers incarcerated in DOC facilities. Its petition stated that Virginia CURE is a non-profit membership organization whose major purpose is to promote family and community ties during incarceration. We permitted Virginia CURE to join as a party to this proceeding by our Order of September 26, 2000. We also permitted other persons who place or receive and pay for intrastate calls on the Inmate Telephone System to become parties to this proceeding. In addition, James R. Kibler Jr., Esquire, filed an appearance in this matter as Special Counsel for the Division of Consumer Counsel, Office of Attorney General.

MCI WORLDCOM and DOC supplemented their initial responses with additional responsive pleadings on May 10, 2000, wherein they renewed their assertion that § 56-234 of the Code of

Virginia divests the Commission of jurisdiction to regulate telephone rates charged pursuant to the Inmate Telephone System.[4]

Our Order of September 26, 2000, responded in detail to MCI WORLDCOM's and DOC's supplemental responsive pleadings. We explained that § 56-234 does not divest the Commission of jurisdiction over this matter, noting that the service at question here is not rendered to the state government. MCI WORLDCOM itself treats those persons who receive and pay for the collect calls placed from DOC facilities as its customers.

MCI WORLDCOM also asserted in its supplemental responsive pleading that § 56-481.1 of the Code of Virginia governs rates for intrastate interexchange service rather than Chapter 10 of Title 56 of the Code.[5] We recognized in our September 26, 2000,

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[4] Section 56-234, in relevant part, states:

> It shall be the duty of every public utility to furnish reasonably adequate service and facilities at reasonable and just rates to any person, firm or corporation along its lines desiring same. It shall be their duty to charge uniformly therefor all persons, corporations or municipal corporations using such service under like conditions. . . . But . . . nothing herein contained shall be construed as applicable to schedules of rates, or contracts for service rendered by any telephone company to the state government, or by any other public utility to any municipal corporation or to the state or federal government.

[5] Section 56-481.1 states:

> If under Chapter 10.1 of this title a certificate of public convenience and necessity is issued to a telephone company to provide interexchange service, the Commission may, if it determines that such service will be provided on a competitive basis,

Order that the rates of interexchange carriers in Virginia, including MCI WORLDCOM, are not now established by traditional rate base, rate of return regulation but are instead provided by the carriers "on a competitive basis" pursuant to § 56-481.1.[6] We further recognized that the rates MCI WORLDCOM charges for service provided under the Inmate Telephone System are in line with the rates the Company (and other interexchange carriers) charges for collect call service to the general public.

We explained, however, that while we have elected to permit MCI WORLDCOM and other interexchange carriers to have the competitive marketplace determine rates and charges for their services, we have also maintained regulatory oversight over the activities of all interexchange carriers and retained the authority to reimpose traditional regulatory requirements on any

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> approve rates, charges, and regulations as it may deem appropriate for the telephone company furnishing the competitive service, provided such rates, charges, and regulations are nondiscriminatory and in the public interest. In making such determination, the Commission may consider (i) the number of companies providing the service; (ii) the geographic availability of the service from other companies; (iii) the quality of service available from other companies; and (iv) any other factors the Commission considers relevant to the public interest. . . .

[6] See Applications of MCI Telecommunications Corp. of Va., et al., For Certificates of Public Convenience and Necessity to Provide Inter-LATA, Inter-exchange Telecommunications Service and to Have Rates Established on Competitive Factors, Case Nos. PUC840022, et al., Final Order and Opinion, 1984 SCC Ann. Rep't 333, aff'd sub nom. GTE Sprint Communications Corp. of Va. v. AT&T Communications of Va., et al. 230 Va. 295 (1985).

carrier in the event the competitive marketplace does not function properly.[7]

We concluded that the complaints presented a factual question as to whether the intrastate interexchange telecommunications service under the Inmate Telephone System is being provided on a competitive basis and, if so, whether the rates charged for such service are nondiscriminatory and in the public interest as required by § 56-481.1. We scheduled a hearing for taking evidence on this issue, as well as the issue of whether MCI WORLDCOM had charged rates inconsistent with its filed tariff, and, if so, what action should be taken.[8]

This matter was heard before the Commission on February 14 and 15, 2001. Mr. Jones appeared pro se. Eric M. Page, Esquire, and Vishwa B. Link, Esquire, appeared on behalf of MCI WORLDCOM, and JoAnne L. Nolte, Esquire, and Mark R. Davis,

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[7] Id. at 344, 350.

[8] Complainant alleged that the rates MCI WORLDCOM charges for service pursuant to the ITS do not comport with the Company's rate schedule for its Maximum Security Collect calls classification on file with the Commission. (MCI WORLDCOM Communications of Virginia, Inc., Va. SCC Tariff No. 2, § 3.0233 (formerly MCI Telecommunications Corp. of Virginia, Inc., Va. SCC Tariff No. 3)). On September 1, 2000, MCI WORLDCOM filed a proposed replacement Maximum Security Collect tariff accompanied with a motion to accept the filing and to waive the public notice requirements of the Commission's Rules Governing the Certification of Interexchange Carriers (20 VAC 5-400-60(L)). In the motion, the Company explains that the rates, terms, and conditions in the proposed tariff took effect on January 1, 1999, in accordance with the terms of a contract with DOC.

We deferred ruling on MCI WORLDCOM's September 1, 2000, motion until resolution of the issues in this case. We will enter an order on the

Esquire, appeared on behalf of DOC. C. Meade Browder, Jr., Esquire, appeared for the Staff of the Commission. Anthony Gambardella, Esquire, appeared for Virginia CURE, and Robert W. Partin, Esquire, appeared for Mr. Kibler as the Special Consumer Counsel.

The Commission received into evidence the prefiled testimony of Mr. Jones, the other parties, and the Staff. In addition, Mr. Jones called as a witness Mr. Craig M. Burns of the Joint Legislative Audit Review Commission.

Virginia CURE filed testimony of Mark E. Evans, Barbara M. Witherow, Jean Williams Auldridge, and Kelly H. Evans. Dr. Michael J. Ileo submitted testimony for the Special Consumer Counsel. Mr. David C. Parcell adopted Dr. Ileo's testimony at the hearing. Ms. Kathleen A. Cummings testified for the Staff. Mr. Edward C. Morris and Mr. John M. Jabe testified for the DOC. MCI WORLDCOM offered the testimony of Mr. Ian Hicks and Ms. Sandra Chandler.

On April 17, 2001, the parties and the Staff filed briefs on the following issues identified by the Commission at the close of the hearing:

(1) Whether the intrastate interexchange telecommunications service furnished by MCI WORLDCOM to

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Company's tariff filing in a separate docket, Case No. PUC000237, and will conduct further proceedings in that docket.

consumers under the ITS is provided on a competitive basis and, if so, whether the rates charged for such service are non-discriminatory and in the public interest as required by Va. Code § 56-481.1;

(2) What action should be taken in view of MCI WORLDCOM having charged rates under the ITS inconsistent with its Maximum Security Collect tariff on file with the Commission; and

(3) Whether § 56-481.1 of the Code of Virginia permits some interexchange services of a carrier to be provided on a competitive basis while other such services provided by the same carrier could be considered not competitive, i.e., whether § 56-481.1 requires an "all or nothing" approach to competitive pricing of interexchange services.

The Commission also invited further argument on the question of whether § 56-234 of the Code of Virginia divests it of jurisdiction in this matter.

NOW THE COMMISSION, upon consideration of the evidence and the pleadings received herein and the applicable law, is of the opinion and finds that the intrastate interexchange service furnished by MCI WORLDCOM to consumers under the ITS is not provided on a competitive basis in accordance with § 56-481.1 of the Code of Virginia; that MCI WORLDCOM must perform an accounting of all ITS charges that have been billed at rates inconsistent with its tariffs on file with the Commission; and

that § 56-481.1 permits the Commission to re-impose rate regulation on any interexchange telecommunications service found not to be provided on a competitive basis.

I.

We first note that we have considered MCI WORLDCOM's and DOC's additional arguments that § 56-234 precludes the Commission from exercising jurisdiction over the rates charged customers under the ITS. These parties assert that we have no jurisdiction over a contract between MCI WORLDCOM and DOC, a state agency. They contend that this matter is governed by Commonwealth v. Virginia Elec. and Power Co. ("VEPCO"), 214 Va. 457 (1974). In that case, the Supreme Court held the Commission lacked jurisdiction over rates charged certain government entities for purposes such as lighting streets and public buildings.

In their briefs, MCI WORLDCOM and DOC equate a municipality's citizens as "users" of street lights in the VEPCO case with the "users" of the ITS. We do not find this argument convincing. Unlike the citizen "users" of street lights, the evidence in this case demonstrates that users of MCI WORLDCOM's collect call services offered through the ITS are a discrete set of consumers who have made arrangements with MCI WORLDCOM to receive service directly from the Company. The Court in VEPCO noted it had previously stated "that the SCC 'is given no

jurisdiction . . . over rates charged the municipalities themselves for electric current.'"[9] It is clear from the evidence in this case that the DOC is not itself charged for the ITS service. It is the people receiving collect calls placed by inmates who are charged by MCI WORLDCOM for the telecommunications services they use. For these reasons, and for those stated previously in our Order of September 26, 2000, we do not find that § 56-234 permits the Commission to abstain from adjudicating the specific issues we have identified relative to the telecommunications service furnished by MCI WORLDCOM under the ITS.

II.

MCI WORLDCOM and the DOC both point to the fact that DOC competitively bids the ITS contract as evidence of the intrastate interexchange telecommunications services under ITS being provided on a competitive basis.[10] Mr. Hicks testified that MCI WORLDCOM's ITS contract with DOC is a package of services including attendant security features to meet the unique needs and requirements of DOC.[11] DOC used eight criteria

[9] 214 Va. at 462 (quoting Virginia-Western Power Co. v. City of Clifton Forge, 125 Va. 469, 478 (1919) (omission in original, emphasis added)).

[10] Ex. IH-16 at 6-7; Ex. ECM-1 at 4-9.

[11] Ex. IH-16 at 3.

to evaluate carriers' bids on the ITS contract. One criterion was the proposed rates and surcharges for the collect call.[12]

We recognize that DOC is vitally interested in the array of services encompassed by the ITS contract that provide necessary security features. The only component of the ITS at issue in this proceeding (and indeed within this Commission's jurisdiction) is the collect call intrastate interexchange telecommunications service offered to consumers using the ITS, and it is this element of the ITS that must be provided on a competitive basis in conformity with § 56-481.1 of the Code.

The evidence presents little doubt that DOC's bidding process does not result in the telecommunications service being "provided on a competitive basis" under any reasonable interpretation of that term in § 56-481.1. Indeed, to our dismay, the evidence at the hearing revealed DOC's bidding process resulted in rates to consumers higher than they otherwise would have been. DOC disclosed that it rejected a bid proposal from MCI WORLDCOM for collect call surcharge rates substantially below the "consumer" rates charged the public for comparable service. DOC Witness Morris offered this explanation:

> Mr. Morris: During -- in the 1999 contract, the selection of this vendor was

[12] Id. at 5-6.

done by a panel composed of a number of people representing several agencies, including the Department of Information technology. The role played by the Department of Information Technology was to review the rates, the surcharge and the commission and advise the [DOC] as to that part of the negotiations, which they did, and their recommendation and the one we adopted was that we would accept the consumer rate for these calls.

MCI actually proposed a discounted rate, and that was rejected.

. . .

MCI submitted what they were charging their consumers. That was what we considered.

. . .

It was discussed with members of the Administration, and it was not felt that it was in the public interest to offer rates to inmates less than what the public would pay.

. . .

Commissioner Moore: You turned down the discounted rate?

Mr. Morris: Yes.[13]

[13] Tr. at 67, 69-70. The record was left open to receive from MCI WORLDCOM a copy of its rate proposal that was rejected by DOC. This document reveals that the Company proposed an Interlata/Intrastate Surcharge of 44% less than the consumer rate with a 29% commission to DOC, and an Interlata/Intrastate Surcharge of 77% less than the consumer rate with a 24% commission to DOC. (The per minute rate was to equal the consumer rate.) MCI WORLDCOM also

Mr. Morris contended that DOC's refusal of MCI WORLDCOM's lower rate proposal was unrelated to the reduced commission payment associated with lower rates.[14]

Regardless of any public policy considerations that resulted in DOC rejecting a lower rate proposal from MCI WORLDCOM,[15] the bidding process employed by DOC is clearly not "competitive" as to rates from the standpoint of the consumer.[16] We therefore find that intrastate interexchange telecommunications services furnished by MCI WORLDCOM to consumers under the ITS are not provided on a competitive basis

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offered the consumer rate for all rates and surcharges with a 36% commission to DOC. (S.C.C. Document Control Ctr. No. 010220256 (filed Feb. 28, 2001).

[14] Tr. at 76. The evidence reveals that MCI WORLDCOM pays to the DOC a percentage, presently 40%, of the Company's billable gross revenues from the ITS collect call service. This practice of paying commissions to the owner of facilities where phones are located is not atypical in the provisioning of pay telephone services.

[15] Mr. Morris noted that it was not felt that it was in the public interest to offer rates to inmates less than what the public would pay. We noted at the hearing that it is typically not the inmates themselves but rather the non-inmate members of the public that receive the collect calls who are actually being charged for the service. Tr. at 69-70.

[16] We are well aware of our precedent, affirmed by the Supreme Court, that the mere threat of competition is sufficient to permit interexchange carriers to provide their services on a competitive basis pursuant to § 56-481.1. See note 6, supra. This standard does not help MCI WORLDCOM and DOC. While we can accept that the ITS service must be provided by a single carrier for security reasons, we cannot ignore the evidence that demonstrates no true threat of price competition exists under the bidding process employed by DOC.

Furthermore, inmate calls from DOC facilities can only be completed via the present ITS arrangement. Competitive alternatives such as alternate operator services, credit card, or calling card services provide no competitive alternative, and therefore competitive pressure on the pricing of the service.

pursuant to § 56-481.1. Because we find the service is not provided on a competitive basis, we need not determine under § 56-481.1 whether the rates charged for this service are nondiscriminatory and in the public interest.

III.

The second issue is not contested. MCI WORLDCOM acknowledges that during the period January 1, 1999, through August 31, 2000, the intrastate interexchange rates charged its customers using the ITS did not comport with its tariff on file with the Commission.[17] Because we have found that the service at issue is not exempt from our jurisdiction, and thus it must be provided pursuant to a Commission tariff, we are afforded little discretion in resolving this issue. A public utility may charge customers only the rates specified in the company's tariffs. Deviating from filed tariffs is prohibited.[18] We will accept, for purposes of mitigating the Company's potential liability, MCI WORLDCOM's "Maximum Security Tariff" filed September 1, 2000, with the Company's Motion to Accept Tariff Filing.[19] We will docket this in Case No. PUC000237 by separate order of the Commission.

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[17] Ex. SC-18 at 1.

[18] See C & P Tel. Co. of Va. v. Bles, 218 Va. 1010, 1013-14 (1978); Va. Code § 56-234.

[19] S.C.C. Document Control No. 000910006.

As there is no evidence MCI WORLDCOM willfully violated the law in failing to have proper tariffs on file, we will not take punitive measures against the Company. However, MCI WORLDCOM shall perform an accounting of its charges to customers receiving its Maximum Security collect call service during the January 1, 1999, to August 31, 2000, period, and the Company shall file with the Commission the results of said accounting within 90 days of our Order docketing Case No. PUC000237. The Commission will consider this matter further, including possible refunds, in that docket.

IV.

MCI WORLDCOM and the DOC contend in their briefs that the Company's Maximum Security Collect call service provided through ITS cannot be singled out and judged whether it is being provided on a competitive basis. MCI WORLDCOM states that the Commission has never conducted such an analysis before when awarding certificates pursuant to § 56-481.1. The DOC notes that the language of the statute does not require that each component of interexchange service be reviewed individually to determine whether the service is competitive.

The Staff's brief, on the other hand, notes that § 56-481.1 does give the Commission flexibility in that the statute permits the Commission to "approve rates, charges, and regulations as it may deem appropriate" and requires the Commission to consider

the public interest. The DOC is correct that the statute does not require that each component of interexchange service be reviewed individually to determine whether the service is competitive prior to the issuance of a certificate. The statute does not prevent us, however, from undertaking such a review, and we believe the public interest requirement of § 56-481.1 permits, if not obligates, us to do so upon a valid complaint that a service provided pursuant to the statute is not, in fact, provided on a competitive basis. We agree with the view expressed in the Staff brief that it would be illogical to assume that the General Assembly left the Commission with no recourse but to stand by and allow a noncompetitive service to continue or, alternatively, to revoke competitive pricing for all other interexchange services due to a single uncompetitive service.

Section 56-481.1 does not irrevocably extinguish Chapter 10 ratemaking for interexchange carriers. The evidence demonstrates that MCI WORLDCOM's intrastate interexchange service under ITS is unrestrained by competition. We cannot refrain from re-imposing traditional regulatory ratemaking when the competitive marketplace cannot function as an effective regulator on rates in conflict with the public interest. We will direct MCI WORLDCOM to file just and reasonable rates under

Chapter 10 of Title 56 for its non-competitive Maximum Security Collect call service.

V.

Because we find that the intrastate interexchange collect call service provided by MCI WORLDCOM under the DOC Inmate Telephone System is not provided on a competitive basis consistent with § 56-481.1, we must impose traditional ratemaking procedures for this interexchange service.

Contrary to assertions by these parties, the Commission does not seek to exert jurisdiction "over the contract" between DOC and MCI WORLDCOM. We recognize that the Inmate Telephone System consists of a panoply of services provided by MCI WORLDCOM to the DOC, including important security features protecting the general welfare of the public. Our interest in this matter extends only to the intrastate telecommunications service provided to the public pursuant to that contract. The rates for this service are within this Commission's jurisdiction and are indeed not found anywhere within the DOC/MCI WORLDCOM contract itself.

We commend the DOC for devising a system of uniform access to telecommunications services for its inmate population at apparently no cost to Virginia taxpayers, and we assert no authority over the operational features of the ITS as administered by DOC.

Accordingly, IT IS ORDERED THAT:

(1) The rates and charges for MCI WORLDCOM's Maximum Security Collect call intrastate interexchange telecommunications service are hereby made interim and subject to refund as of the date of this Order.

(2) On or before January 7, 2002, MCI WORLDCOM shall file with the Commission, in Case No. PUC000237, rates and charges for its Maximum Security Collect call intrastate interexchange telecommunications service, with cost and other supporting documentation, based on the ratemaking provisions of Chapter 10 of Title 56 of the Code of Virginia.

(3) MCI WORLDCOM's September 1, 2000, tariff filing for its Maximum Security Collect call service will be docketed by separate Order in Case No. PUC000237 for further proceedings consistent with the findings in this Order, including addressing the possible refunds of charges in excess of the tariff.

(4) There being nothing further to come before the Commission in this docket, this matter is dismissed and the papers filed herein shall be placed in the Commission's file for ended causes.